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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-0344-17

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
12/27/2018
DEANA WILLIAMSON, CLERK

THE STATE OF TEXAS, Appellant

v.

JOEL GARCIA, Appellee

* * * * *

STATE PROSECUTING ATTORNEY'S
MOTION FOR REHEARING

* * * * *

Appeal from El Paso County

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2. The determinative factfindings of the trial judge are entitled to no deference because the judge conflated law with fact and made conflicting findings.

3. Rehearing should be granted because the objective determinative facts known to the officers unquestionably support exigency, and the Court's decision requires immediacy, not imminency, for exigency and fails to consider dissipation.

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

GROUNDS FOR REHEARING

1. **The Court erred to defer to written findings not properly before it; the El Paso Court of Appeals ruled they would not be filed because they were entered in violation of its order to stay. Erroneous reliance on those findings impacts the Court's analysis and holding.**

2. The determinative factfindings of the trial judge are entitled to no deference because the judge conflated law with fact and made conflicting findings.

3. Rehearing should be granted because the objective determinative facts known to the officers unquestionably support exigency, and the Court's decision requires immediacy, not imminency, for exigency and fails to consider dissipation.

ARGUMENT

1. The written findings were not properly before the Court.

This Court erred to rely on the trial court's written findings of fact. *See Garcia v. State*, __S.W.3d__, No. PD-0344-17, Slip Op. at 5, 24 (Tex. Crim. App. Dec. 12, 2018). The El Paso Court of Appeals entered an order stating that the written findings were made in violation of its order to stay. Therefore, it concluded:

> Having found that the trial court violated the stay order as set forth above, we grant the State's motion in part, and we vacate the amended gag order entered on November 18, 2015 and the supplemental FFCL entered on December 8, 2015. The supplemental clerk's record containing the supplemental FFCL will not be filed or considered by the Court.

Garcia v. State, No. 08-15-00264-CR, Order (Dec. 30, 2015).[1] Because the Court does not cite to the record, with the exception of two statements about the written

[1] Available on the court of appeals' docket at: http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=76e2483d-4fbf-446b-a18d-a18d9b045c98&coa=coa08&DT=Other&MediaID=a1043bea-28b2-4546-96ec-e86132406584.

findings, the State cannot determine the extent to which those findings informed the Court's decision. Rehearing should be granted so the Court can reconsider its decision *sans* the written findings. On rehearing, the Court should weigh the oral findings in a different light in the absence of the written ones. As explained below, they are not entitled to deference and the objective facts show the draw was justified by exigent circumstances.

2. The determinative factfindings of the trial judge are entitled to no deference because the judge conflated law with fact and made conflicting findings.

A. Conflating law and fact.

The factfindings are more mixed up than a stray dog's breakfast. Consequently, they should be disregarded, particularly the dispositive findings about what Officers Torres and Lom objectively knew. The trial judge seemed incapable of truly understanding how a credibility determination is made with respect to facts. As the Court noted, the judge found the officers' assessment of exigent circumstances "not credible." *Garcia*, Slip Op. at 27. But this was not a one-off. He repeated this conclusory belief at least seventeen times. 8 RR 12, 13, 26, 46, 50-55, 57, 106-07. When the line between fact and law is not properly regarded, the findings as a whole cannot be trusted and it is clear the judge was not in an appreciably better position to make findings. *See Garcia*, Slip Op. at 13. This Court should therefore reject them

in toto. *Cf. Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008) ("When our independent review of the record reveals findings and conclusions that are unsupported by the record, we will, understandably, become skeptical as to the reliability of the findings and conclusions as a whole.").

B. Appellate courts should not resolve conflicts among a trial judge's factfindings.

It is one thing for a trial judge to choose to believe only some of a witness' testimony, but it is another for an appellate court to apply the same rationale to the trial judge's findings. Appellate courts should not resolve conflicts among a trial judge's findings. For instance, here, the Court determined that it was reasonable for the trial judge to have found that Officer Torres could both view and hear what was happening when Appellee's condition was being evaluated by the triage team. *Garcia*, Slip Op. at 24. But on several occasions, the trial judge stated the opposite: (1) Officer Lom, who was with Officer Torres, 3 RR 81, "couldn't hear what was going on. He couldn't hear the conversation. He didn't know what was happening" 7 RR 17; (2) "it's just a bag and he can't hear or see what's going on;" 7 RR 51; (3) "despite testimony . . . that he could not hear an exchange between doctors and nurses, and the defendant, especially the I.V. nurse . . . what he saw is what appeared to be a nurse holding an I.V. bag and the defendant . . . shaking his head in the negative." 7 RR 102-03. On the other hand, there are plenty of statements made by the judge supporting the Court's

conclusion. 7 RR 20 (noting that medical personnel stated that persons in the area generally can hear everything), 7 RR 34-35 (observing that, at the time of the draw, the officers knew Appellee was not being treated), 55 (stating everybody could hear that there was no I.V. going to be done), 104 (same). It cannot be both. So which is it? There was no actual resolution of the conflicts in testimony, as this Court concluded. *See Garcia*, Slip Op. at 23. If the purpose of findings is frustrated by their quality, there is no reason to adhere to the normal rule of affording almost total deference. *Cf. Ex parte Reed*, 271 S.W.3d at 727 (the Court may become skeptical when the findings are largely unsupported by the record). Therefore, the Court should not "grapple with the facts as settled in the courts below." *Garcia*, Slip. Op. at 31. Instead, it should review the record *de novo* to determine what are the most material facts to the issue—what the objective facts demonstrate about what the officers knew before drawing Appellee's blood.

3. Rehearing should be granted because the objective facts known to the officers unquestionably support exigency, and the Court's decision requires immediacy, not imminency, for exigency and fails to consider dissipation.

A. The objective facts support exigency; imminency, not immediacy, is required.

The objective facts support exigency, regardless of whether the officers only observed the medical personnel or both observed and overheard them. Assuming the officers did hear the discussion among medical personnel, according to the findings

this Court deferred to, then they were affirmatively aware the medical assessment of Appellee was not complete. Contrary to this Court's opinion, treatment was not "concluded" and there was no guarantee that "'no one was going to mess' with his blood." *Garcia*, Slip Op. at 23. The nurse said the doctor told her "only scans were going to be done, an I.V. wasn't needed or blood wasn't going to be needed either . . . " during the initial assessment.[2] 2 RR 85; *see also* 2 RR 124 (doctor testified his assessment of Appellee was from 3:06 a.m. until 3:28). Therefore there is no need to "graft knowledge of, or concern about, a [CT] procedure not even ordered until 3:18 a.m.," as the Court contends. *Garcia*, Slip Op. at 29. The 3:18 order memorialized and documented the order previously verbalized. Additionally, the doctor testified that he told the other medical professionals that his decision to forgo the I.V. was temporary. 2 RR 122 (informed staff they did not need to "start one at that time" and should standby and wait for his direction). These key facts were overlooked by the trial judge and this Court. Yet, if it is presumed the officers overheard the medical team, then these details cannot be unfairly excluded. Therefore, assuming these facts were also known, in addition to those discussed below, it was reasonable for the

[2] It would be improper to credit the trial judge's statement that the CT scan was "precautionary." 8 RR 102. In addition to being beyond the scope of the judge's expertise, it conflicts with the doctor's statement that it was intended to rule out a head injury, 2 RR 120, and judge's earlier acknowledgment that the scan would "aid" in the doctor's assessment of Appellee. 2 RR 133.

officers to believe treatment was ongoing and that Appellee's health status was still uncertain and subject to change. It was also reasonable for them to assume that Appellee would be physically unavailable for some period of time during the scan. Therefore, the administration of an I.V. was imminent up until and including the time the CT scan test results were reviewed by the doctor. *See State v. Tullberg*, 857 N.W.2d 421, 448-49 (Wis. 2014) (finding exigency based, in part, on the fact the officer knew the suspect was going to have a CT scan that could take a considerable amount of time and could have revealed the need for immediate treatment).

Next, assuming the officers did not hear the medical staff, then it cannot be expected that they could reasonably believe that medical treatment ceased. What they knew at the time of their decision provided them with reason to believe that the administration of an I.V. was imminent[3] even if it was not immediate.[4] The mere fact the triage team exited without having first administered an I.V. did not clearly mark the end of Appellee's diagnosis and treatment. Appellee remained in the room and

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[3] "Imminent" means "to project over, overhang, threaten"; "appearing as if about to happen; likely to happen without delay; impending[.]" WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED, at 909 (2d ed. 1979).

[4] "Immediate" means "having nothing come between"; "not separated in space; in direct contact; adjacent"; "not separated in time; acting or happening at once; instant[.]" WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED, at 909 (2d ed. 1979).

had not been discharged; without an all-clear on his health status, Appellee was still under the care of the hospital staff as a Level II trauma patient. 3 RR 144.

Information known to the officer up to that point is significant. Officer Torres knew Appellee moaned in pain at the scene and was categorized as a Level II trauma patient because he could have suffered internal injuries. 2 RR 6, 64, 68; 3 RR 73, 91, 125. Officer Torres also possibly knew that the EMT, during transport, told Appellee he needed to start an I.V. in case Appellee's blood pressure dropped and he needed medication. 2 RR 6, 64, 68; 3 RR 91. Both officers observed the precautions taken in transporting Appellee; he was immobilized on a backboard and fastened into a C-collar to prevent his neck from moving. 2 RR 25, 108; *see State v. Granger*, 761 S.E.2d 923, 928 (N.C. Ct. App. 2014) (officer "had the added concern of the administration of pain medication to Defendant. Defendant had been in an accident severe enough that he was placed on a backboard for transportation to the hospital and complained of pain in several parts of his body."). And both were aware that his Level II trauma designation required the immediate intervention of a team of professionals upon Appellee's arrival. 2 RR 143, 145; 3 RR 77-78. Officer Lom, who had provided security at the hospital for over 10 years, was familiar with the procedures entailed in assessing a Level II trauma patient and knew that administering an I.V. is part of the standard initial protocol. 2 RR 131, 145 (the trauma team does their job

automatically), 175-75 (familiar with the E.R. process and trauma team operations and familiar with what is entailed in analyzing or assessing a Level II trauma).

It was reasonable for the officers to proceed under the assumption that Appellee may be critically injured. So, for purposes of exigency, even though Appellee had declined an I.V., there was a real possibility that his condition would necessitate it, regardless of consent. Officer Lom also testified that some E.R. patients change their mind and accept treatment after a nurse continues to discuss the issue with the patient. 2 RR 152, 174-75. Thus, it was also possible that Appellee could have changed his mind. Had either of those events occurred, the officers could have done nothing to preserve a sample since they knew they could not interfere with Appellee's medical care. 2 RR 169. The I.V. was an imminent, looming threat to the efficacy of a usable blood sample. *See Cole v. State*, 490 S.W.3d 918, 926 (Tex. Crim. App. 2016) (officer was "reasonably concerned" that the administration of pain medication would adversely affect the test results); *State v. Inman*, 409 P.3d 1138, 1144 (Wash. Ct. App. 2018) (exigent circumstances based, in part, on the suspect's continued medical care and transfer to trauma center).

That the officers told the phlebotomist they needed her assistance but then let her resume her duties while they waited on paperwork before directing her to conduct the draw does not undermine exigency. First, the Court's emphasis on the fact

(according to the trial judge) that they waited as much as twenty minutes to call her back is factually impossible. *See Garcia*, Slip Op. at 24-25, 25 n.70, n.71. The majority of evidence discredited the phlebotomist's time estimate, and the trial judge should have recognized this since he acknowledged that Appellee was admitted into the E.R. at 3:06 a.m. and his blood was drawn at 3:17 a.m. 3 RR 21, 36, 83; 8 RR 24-25, 36. That's only eleven minutes between those events. And in that time Appellee was assessed by the triage team, with an EMT relaying the information he knew, and was X-rayed. 3 RR 23, 31. No deference is owed to the judge's credibility determination as to the phlebotomist because it is not supported by the record.[5] *See State v. Groves*, 837 S.W.2d 103, 106 (Tex. Crim. App. 1992) ("Though we defer to a trial court's factual findings when they are supported by the record, we conclude that the record does not support the trial court's finding . . . ."). With the proper time-line identified, proving the trial judge incredible once again, there is further support that it was a "now or never" situation. 3 RR 174.

The exigency clock should not be stopped upon the phlebotomist's initial exit from the E.R. simply because the officers needed fewer than eleven minutes to get the

[5] Arguable, however, it is unclear whether the Court actually deferred to the findings because it stated that the trial judge "*would* not have abused his discretion," which suggests this Court followed implicit findings. *Garcia*, Slip Op. at 25 (emphasis added).

paperwork ready. The paperwork was, according to the evidence, the blood draw kit, not the warrant. 3 RR 175. The kit contained accompanying forms or paperwork. 3 RR 83-84. Officer Rodriguez stopped working on the warrant and told Officer Lom to hold-off until he could deliver a kit to the hospital, and Officer Lom agreed. 3 RR 175. However, they were able to obtain a kit from another officer and drew the blood before Rodriguez arrived. 3 RR 175, 193. That they allowed the phlebotomist to resume her duties while they waited for an approved kit does not contradict exigency. The sample was obtained at the earliest opportunity.

Officer Rodriguez's efforts to obtain a warrant did not make the risk of destruction insignificant. *See Garcia*, Slip Op. at 25. The bottom line is Rodriguez did not have a warrant at the time exigency was established, and that's all Officers Torres and Lom needed to know. The initiation of the warrant process does mean that the length of time the officers initially found acceptable is forever fixed. The circumstances, like those here, involved an evolving and fluid situation that could implicate life or death. The comfort of knowing an officer is still pursing a warrant and may soon obtain it is of little solace when taint may occur in an instant and they are powerless to prevent it.

B. Dissipation affects the .15 Class A enhancement, which is predicated on BAC at the time of the draw.

Dissipation is also a relevant factor that the Court did not consider but should have. Approximately two hours had already passed when Appellee's blood was drawn. 3 RR 71 (dispatched at 1:48 a.m.), 5 RR 23 (dispatched at 1:47). Alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour. *Missouri v. McNeely*, 569 U.S. 141, 169 (2013) (Roberts, C.J., concurring and dissenting). Texas law allows for enhancement to a Class A misdemeanor for driving while intoxicated if the defendant's BAC was .15 *at the time the analysis was performed*. TEX. PENAL CODE § 49.04(d). Knowing about this enhancement option and that Appellee could possibly only be charged or convicted of DWI, the officers acted reasonably to preserve their ability to obtain a sample that may yield a .15 or more BAC. Because a few hours had passed since the accident, dissipation could have been anywhere from .050 to .02 percent. *See McNeely*, 569 U.S. at 156 (2013) ("longer intervals may raise questions about the accuracy of the [BAC] calculation"), 165 (metabolization and loss of evidence must be considered in assessing exigency); *Mata v. State*, 46 S.W.3d 902, 908-13 (Tex. Crim. App. 2001) (unknown variables—when the defendant last ate, and when, how fast, and how much he drank—will affect the equation so that the degree of intoxication at a given time is less certain). Therefore, the objective fact of dissipation lends further support for finding

exigent circumstances.

3. Conclusion: Exigency has been established.

The Court states that officers face an impossible choice—delaying treatment to obtain the best evidence or allowing evidence to be spoiled so a life can be saved. *Garcia*, Slip Op. at 21. But, as the record here demonstrates, officers have no choice. What type of medical treatment will be provided and when is within the province of medical professionals alone. Though the Court later seemed to recognize this limitation, *Garcia*, Slip Op. at 22, it did not apply this very weighty circumstance properly in this case due to its undeserved deference to the trial judge's confusing, incomplete, and contradictory findings. As a result, the Court's decision puts officers in the impossible position of waiting for a moment of certainty that will inevitably occur at a time that they are prohibited from interfering with emergency treatment and accessing a suspect. Here, knowing they could not interfere, the officers had eleven minutes to consider Appellee's Level II trauma status, Appellee's uncertain health, and medical personnel's continued evaluation, diagnosis, and still undetermined treatment. Their conclusion that there was an imminent risk that the administration of an I.V. could impact the efficacy of any blood analysis was reasonable. Additionally, it was reasonable for the officers to have considered the dissipation rate and how it could impact the Class A enhancement for DWI. The impact of dissipation, a mixed

question of law (TEX. PENAL CODE 49.09(d)) and well-established fact (0.01-.025, *McNeely*, 569 U.S. 169 (C.J., Roberts, concurring and dissenting)), should always factor into this Court's exigency analysis.

PRAYER FOR RELIEF

The State prays that its motion for rehearing is granted and that this Court reverse its decision and hold that the real possibility of the administration of an I.V. to Appellee, a Level II trauma patient still undergoing diagnostic treatment in the ER, provided exigent circumstances for the warrantless blood draw.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,092 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State Prosecuting Attorney's Motion for Rehearing has been served on December 20, 2018, *via* email or certified electronic service provider to:

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